HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 647

JOSEPH STARR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	2
Statement	3
Reasons for Granting the Writ	9
Conclusion	16
Appendix A—Opinion Below	17
B—Judgment Below	24

CASES.

Blair, Commissioner v. Oesterlein Machine Co., 275 U. S. 220, 226-227	13
Board of Tax Appeals v. United States, ex rel. Shults Bread Co., 37 F. 2d 442, 443	10
Brewer v. Hassett, 2 F. R. D. 222	13
Builders Steel Co. v. Commissioner, 179 F. 2d 377, 379-80	14
Donnelly Garment Co. v. N. L. R. B., 123 F. 2d 215, 224	14
Fowkes v. Dravo Corporation, 5 F. R. D. 51, 52	13
Hickman v. Taylor, 329 U. S. 495, 501	9
Katz v. Commissioner, 188 F. 2d 957, 959	10
Reo Motors, Inc. v. Commissioner of Internal Revenue, 219 F. 2d 610, 612	9
Stern v. Commissioner, 215 F. 2d 701, 708	9
Williams v. Kirtland, 80 U. S. (13 Wall.) 306, 310	13

ARTICLES AND TEXTS.

Annotation on "Governmental privilege against disclosure of official information—Federal cases," 95 L. Ed. 425, and particularly on "Commissioners and Collectors of Internal Revenue" at pp. 450, 451 (Annotation supplemented, 97 L. Ed. 735)..... 13

Berger and Krash, "Government Immunity from Discovery" (1950), 59 Yale L. J. 1451..... 13

P. S. Dyer-Smith, Federal Examinations Before Trial (Baker, Voorhis & Co., 1939), pp. 30-31..... 11

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on November 2, 1955.

CITATIONS TO OPINIONS BELOW.

The memorandum findings of fact and opinion of the Tax Court are set forth in full at R. 1812-50 and are reported in 13 TCM 277. The opinion of the Court of Appeals, printed in Appendix A hereto, *infra,* p. 17, is reported in 226 F. 2d 721.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 2, 1955. (Appendix to Record, 6); p. 24, *infra*. The jurisdiction of this Court is invoked under 26 U.S.C., Section 7482; and 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED.

1. Was it a denial of due process for the Tax Court to place "the burden of proving a negative" upon petitioner and at the same time to deny petitioner the means, through pre-trial discovery procedures, of preparing to meet this admittedly difficult burden?

2. Was it a denial of due process for the Tax Court to refuse to permit the internal revenue agents subpoenaed by petitioner to take the witness stand at the trial?

3. Was it a denial of due process for the Tax Court, in a case *not* involving the "net worth method", to place the burden of proof upon petitioner to establish his net worth?

4. Was it a denial of due process for the Tax Court to delay in making its findings of fact until three years after the trial?

STATUTES AND RULES INVOLVED.

INTERNAL REVENUE CODE OF 1939:

> Sec. 1111. *Rules of Practice, Procedure, and Evidence.*
> The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in the courts of the District of Columbia in the type of proceedings which prior to September 16, 1938, were within the jurisdiction of the courts of equity of said District.
> (26 U. S. C., formerly Sec. 1111, now Sec. 7453.)

RULES OF PRACTICE BEFORE THE TAX COURT OF THE UNITED STATES:

Rule 32.—*Burden of Proof.*

The burden of proof shall be upon the petitioner, except as otherwise provided by statute, and except that in respect of any new matter pleaded in his answer, it shall be upon the respondent.

(26 U. S. C., formerly following Sec. 1111, now following Sec. 7453.)

TREASURY REGULATIONS:

Provision of Regulation 12:

"Whenever a subpoena shall be served upon them" [meaning employes of the Internal Revenue] "they will, unless otherwise expressly directed appear in court in answer thereto and respectfully decline to produce the records or give the testimony called for on the ground of being prohibited therefrom by the regulations of the Treasury Department. Officers disobeying these instructions will be dismissed from the service and may incur criminal liability."

(Cited by counsel for respondent at R. 1758.)

STATEMENT.

Petitioner initiated this case in the Tax Court on August 24, 1949 by his petition for redetermination of a deficiency determined by the Commissioner. (R. 6, 14.) Jurisdiction was invoked under the 1939 Internal Revenue Code, 26 U. S. C., Sections 272(a)(1) and 1101.

The issue of fact involved was whether petitioner, a partner of Starr Pen Company, had received and failed to report as income alleged "black market" cash payments totalling $235,198.80 claimed to have been paid by Martin P. King, a partner of King, Larson & McMahon, one of hundreds of wholesalers supplied by Starr. (R. 34, 38.) Under Tax Court Rule 32 the burden of proof was on

petitioner to disprove this allegation,—that is, petitioner had "the burden of proving a negative." (R. 1842.)

In order to sustain this burden of proof, petitioner sought to establish that King had himself dissipated the cash in question and that his claim of having given the money to petitioner was part of a scheme to evade his own tax liability. To this end, petitioner, on October 31, 1950, filed in the Tax Court a motion, supported by an argument and brief of the law, requesting that he "be permitted to obtain discovery by depositions and otherwise, of all matters not privileged, which will aid petitioner in preparation for trial * * * to the same extent and in like manner as provided by Rules 26, 28 to 34 inclusive, 36, 37 and 45 of the Federal Rules of Civil Procedure." (R. 45.)

In his motion for discovery, petitioner pointed out that under Tax Court Rule 32 petitioner had the burden of proving that Martin P. King's story was false; and that the only way petitioner could prepare to meet this burden was through the use of those discovery procedures which would be available under identical conditions if the case were at issue in the District Court rather than in the Tax Court. Petitioner wanted a pre-trial examination of Martin P. King and his partners in King, Larson & McMahon, their books and records, and an examination of other specified witnesses, for the purpose of developing the facts which would show that Martin P. King had not given the alleged cash to petitioner but had used the cash for extensive gambling activities, and for the purchase of diamonds, jewelry and furs. The motion concluded with a detailed list of the *subpoenas* and *subpoenas duces tecum* requested to be issued and directed to specified witnesses. (R. 45-60.) The motion was argued orally in Washington on October 25, 1950. (R. 61.) It was held under advisement for two months. On December 28, 1950

the Tax Court, without stating any reasons, denied the motion. (R. 3, 61.)

Deprived of the aid of pre-trial discovery, the only means remaining open to petitioner to attempt to meet the burden of proof placed upon him by Tax Court Rule 32 was to develop such facts as he could concerning the financial machinations of Martin P. King by cross-examination of the witnesses produced by the Commissioner at the trial. The only witnesses produced by the Commissioner were Martin P. King, his associates, and their former bookkeeper, all of whom were interested in the outcome. The $235,198.80 in alleged cash "side payments" which King claimed to have paid to petitioner has been taken as a deduction for "cost of merchandise" on King, Larson & McMahon's income tax returns for the tax years in question (R. 870), but up to the time of the trial had not been allowed. (R. 728-29.) The tax returns of Martin P. King and his partners (for the same period as to which "the determination" against petitioner had been made) were still open. Up to the time of the trial, the Commissioner had not investigated the financial affairs of Martin P. King and his partners and had not audited the books and records of King, Larson & McMahon. (R. 1541-42.)

The principal witness, Martin P. King, had cashed, over a period of eight months, innumerable checks drawn on the account of King, Larson & McMahon made payable to "Cash." Of these, he identified 32 as having been cashed by him for the purpose of delivering the proceeds to petitioner. (R. 498-617, 32.) As to the great majority of these alleged payments to petitioner, King said that there were no other witnesses. (R. 498-615.) The testimony of King's partners was extremely vague and contradictory. (R. 1118 *et seq.*) The books and records of King, Larson & McMahon—self-serving documents—which had never been

audited by the Commissioner, were replete with innumerable conflicting entries; and scores of entries had been made, not at the time of the alleged transactions, but many months afterwards, in an attempt to lend support to King's story. Normal bookkeeping procedures were not followed; entries would be made on the basis of oral instructions given by King many months after King had cashed the checks in question. Innumerable retroactive entries of alleged "side payments" were made on invoices many months after the invoices were paid. (R. 1559, 1563, 1566, 1570, 1574, 1576, 1628, 1637, 1650, 1675, 1717.)

Although at the trial petitioner was able to show that King had made numerous deposits of cash in his personal checking account, and that a tally of King's personal account showed deposits of $200,000.00 in excess of his available income from all sources (R. 1017-32); and further was able to show that King gambled extensively and had accounts with six bookmakers (R. 681-82); and further was able to show that King had expended large sums of cash for the purchase of diamonds, jewelry and furs (R. 949-61)—still petitioner, because of the denial of pre-trial discovery, was unable to tie all these facts together in a way which would conclusively show that the $235,198.80 in cash which had come into King's hands was expended by him personally and not, as King claimed, given to petitioner.

No Internal Revenue agents took the witness stand in support of the charge that the petitioner had received any "black market" cash payments from King; and there was no assertion by the Commissioner, or any attempt whatsoever to show, that there had been any unexplained increase in petitioner's net worth—notwithstanding that the financial affairs, books and records of petitioner and those of his partnership, Starr Pen Company, had been exhaustively

investigated by special agents of the Intelligence Unit of the Bureau of Internal Revenue in connection with an audit of petitioner's net worth. (R. 110-111, 216, 219.)

Petitioner subpoenaed as witnesses on his behalf two special agents of the Intelligence Unit of the Bureau of Internal Revenue. (R. 1757-59.) One of them, ALBERT J. EDMOND, had spent many months investigating petitioner's net worth. (R. 110-11, 216-19.) Early in the trial, government counsel announced: "I do not think Mr. Edmond will testify in this trial despite the fact that he has been subpoenaed." (R. 845.) The other Intelligence Unit agent, K. N. WORCESTER, had started only a week before the commencement of the trial to investigate King's net worth. (R. 110, 425-434.)

The Tax Court (Judge Marion J. Harron presiding) refused to permit the internal revenue agents to take the stand, on the ground that their testimony was *privileged;* and said that it was not even necessary for these witnesses to appear in response to petitioner's subpoena—that their appearance was only "a matter of form." (R. 1578.) The ground cited by Government counsel for refusing to permit these witnesses to take the stand, and acquiesced in by the Tax Court, was a provision of Treasury Regulation 12, set forth at p. 3, *supra.*

The decision of the Tax Court was delayed until more than three years after the conclusion of the trial. (R. 1800, 1850.) Solely on the basis of the self-serving testimony of King and his associates, it upheld the Commissioner's determination of deficiency. (R. 1811-50.) In its opinion, the Tax Court said nothing about its denial of petitioner's motion for discovery, and said nothing about the fact that it had refused to permit the Intelligence Unit agents subpoenaed by petitioner to take the witness stand. It asserted that one of the reasons petitioner failed to meet his

"difficult burden of proof" was because he did not make "use of the increase in net worth or bank deposit methods, just as, in some instances, the Commissioner resorts to such methods to establish the amount of income." (R. 1842.) In this connection, the Tax Court omitted to mention that one of the reasons petitioner had subpoenaed special agent Edmond (whom the court would not permit to testify) was to show that the Government had made an exhaustive audit of the petitioner's net worth and had found nothing open to question. (R. 1759-60.)

The Court of Appeals for the Seventh Circuit affirmed the judgment of the Tax Court, holding: (1) "that taxpayer was not denied due process because the Tax Court refused to grant his motion for discovery"; (2) that it would not pass upon the question whether the Tax Court was justified in refusing to permit the special agents of the Intelligence Unit to take the witness stand on the claimed ground of "privilege", saying that the evidence sought was "neither relevant nor material"—regardless of the fact that there had been no objection in the trial court to the offered testimony on the ground of irrelevance or immateriality; (3) and that the Tax Court's "delay of three years in making a decision in the case at bar is deplorable" but was not reversible error.

In the opinion of the Court of Appeals handed down on November 2, 1955, the following sentence appeared:

> "If the course of progress,—or more accurately speaking, the lack of progress—after this case was submitted to the Tax Court, is not an exceptional and unusual situation, it indicates a break-down in the prompt administration of justice."

This sentence was deleted at the direction of the Court of Appeals on November 28, 1955, in a letter to West Publishing Company and counsel of record.

REASONS FOR GRANTING THE WRIT.

The questions presented are novel and of cardinal importance in determining whether the Tax Court—"an independent agency in the Executive Branch of the Government" (26 U. S. C. Section 7441)—shall be held equally responsive to the modern concepts of procedural due process as the federal courts within the Judicial Branch. There has been "a consistent and growing recognition" that the Tax Court is a judicial tribunal "exercising inherently judicial functions and having the necessary judicial powers to carry out such functions." *Reo Motors, Inc.* v. *Commissioner of Internal Revenue,* 219 F. 2d 610, 612 (C. A. 6th, 1955). It should, therefore, follow accepted forms of judicial procedure. *Stern* v. *Commissioner of Internal Revenue,* 215 F. 2d 701, 707-8 (C. A. 3rd, 1954). The decision of the Court of Appeals for the Seventh Circuit sanctions the Tax Court's departure from the accepted course of modern-day judicial proceedings in a manner which calls for an exercise of this Court's power of supervision.

Refusal to Allow Discovery.

1. The basic philosophy of modern federal procedure is that prior to a trial every party to a civil action is entitled to disclosure of all relevant information, including information as to the existence or whereabouts of facts which will aid him in searching out the material evidence necessary to establish his case. "Thus civil trials in federal courts no longer need be carried on in the dark." *Hickman* v. *Taylor,* 329 U. S. 425, 501 (1947). If petitioner had had the financial means to pay the huge tax and penalty assessed, and had then sued the Collector for refund in the District Court, he would have been entitled to invoke the pre-trial discovery aids provided by the Federal Rules of Civil Procedure. But these rules

are not applicable to proceedings in the Tax Court. *Katz* v. *Commissioner of Internal Revenue,* 189 F. 2d 957, 959 (C. A. 2d, 1951). It is an anomaly in the federal system that the Rules of Practice of the Tax Court, 26 U. S. C. following Section 7453, make no provision for pre-trial discovery by depositions or otherwise. Rule 44 governing the issuance of subpoenaes, and Rule 45 governing the taking of depositions, pertain only to adducing evidence to be introduced at the trial.

Nevertheless, as pointed out by petitioner in his motion (R. 57), the Tax Court does have the power to modify existing rules if the ends of justice require it in a given case. *Board of Tax Appeals* v. *U. S. ex rel. Shults Bread Company,* 37 F. 2d 442, 443 (App. D. C., 1929). Petitioner requested in the alternative (1) that the Tax Court revise its Rules of Practice by providing discovery procedures, or (2) that it enter an appropriate order in the instant case permitting petitioner to obtain discovery by depositions and otherwise. (R. 45.) But the court arbitrarily declined to adopt either alternative.

What were the consequences to petitioner of the arbitrary denial of discovery? As the Tax Court itself recognized, under its Rule 32 (p. 3, *supra*) the burden of proof placed upon petitioner "involved the proving of negatives" and for that reason was "such a difficult burden of proof." (R. 1842.) The brute fact is that the very nature of the situation made it an impossible burden to meet without the aid of discovery. In short, petitioner had the burden of demonstrating "by a preponderance of the evidence" (R. 1842) that Martin P. King had spun a web of lies, and had altered the books, records, check stubs, etc. of King, Larson and McMahon for the purpose of avoiding tax liability himself—when the government itself had not even bothered to investigate King's story and had not troubled to audit his records or those of his

partnership. The only possible way that petitioner could have hoped to meet this burden of proof was to take the depositions of King and his partners, and analyze their books, records, bank accounts, etc. *in advance of trial* in order to trace King's disposal of huge sums of cash for diamonds, jewelry and furs, for horse-betting through six bookmakers, and for other gambling ventures and extraordinary cash expenditures. It was a sheer impossibility for petitioner to adequately show these facts and circumstances simply by cross-examination during the trial; he could not then link all the relevant facts into the solid chain of evidence necessary to establish that King had personally spent the $235,198.80 in question. A party cannot be expected to prepare his case in the midst of a heated trial, nor does he have a real opportunity to do so. "The outcome of a trial largely depends on the preparation of counsel for it, and the one thing needed for intelligent preparation is knowledge of the facts, * * * For hundreds of years there was a groping, in the law, for devices by which necessary facts could more easily be ascertained, before trial. This process, slow at first, has greatly accelerated in recent times." P. S. Dyer-Smith, *Federal Examinations Before Trial,* pp. 30-31, (New York, Baker, Voorhis & Co., 1939).

To place upon petitioner what the Tax Court itself regarded as "such a difficult burden of proof" and at the same time to deny petitioner the means of preparing to meet this burden, is manifestly unfair. For the Tax Court to saddle petitioner with the grave consequences of its Rule 32, even to the extent of requiring "a preponderance of the evidence" when the matter to be proved is a *negative,* and at the same time to refuse to modify its Rules of Practice so as to permit discovery—at least for the purpose of this case—is nothing less than a denial of due process.

Due process is a living and growing concept to which the Tax Court should be made as responsive as a District Court. In the final analysis, why should a taxpayer who has the financial means to pay an unfair tax asserted against him, and sue for a refund in the District Court, have a crucial advantage over one who, under otherwise identical conditions of fact, does not have the financial means to seek justice in the District Court?

REFUSAL TO PERMIT WITNESSES TO TAKE THE STAND.

2. At the trial, the only ground upon which the government objected to the Intelligence Unit agents taking the witness stand on behalf of petitioner was that the information in their possession was "privileged" under a provision of Treasury Regulation 12. (R. 1758; quoted at p. 3, *supra*.) There was no objection, or even intimation of objection, that the sought testimony was in any way irrelevant or immaterial. Upon the ground of "privilege", and upon that ground alone, the Tax Court excused Special Agent Edmond and Special Agent Worcester from being sworn as witnesses. Indeed, the court went so far as to announce that the agents' attendance in response to petitioner's subpoena was not required, but only a matter of form. (R. 1758.) The action of the Tax Court in not permitting the agents to take the witness stand, with the result that not a single question could be put to either of them, was so arbitrary and grotesque in view of the settled law that such information was *not* privileged in a civil case, that when the case reached the Court of Appeals the government did a complete about-face: it dropped the contention that the testimony sought was "privileged" and raised for the first time in the Court of Appeals the purely abstract and hypothetical objection that the testimony would have been "irrelevant and immaterial." The Court of Appeals upheld this sophistry,

declining to pass upon the point squarely raised by petitioner that information in possession of the internal revenue agents was not privileged.

It has been settled by this Court that the government has no privilege in a civil case to avoid disclosure of information obtained by it in a matter at issue with a taxpayer. *Blair, Commissioner of Internal Revenue* v. *Oesterlein Machine Company,* 275 U. S. 220, 226-7, 72 L. Ed. 249, 253 (1927). More recently, in *Brewer* v. *Hassett,* 2 F. R. D. 222 (D. Mass., 1942) it was held that the regulations of the Treasury Department which forbid employees to disclose official records and information were not applicable in a civil action against the collector of internal revenue, and that an internal revenue agent would be required to answer questions notwithstanding that the statements about which he was sought to be questioned had been received by him in his official capacity. See also: *Fowkes* v. *Dravo Corp.,* 5 F. R. D. 51, 52 (E. D. Pa. 1945); ANNOTATION: "Governmental privilege against disclosure of official information—Federal cases," 95 L. Ed. 425, and particularly on "Commissioners and Collectors of Internal Revenue" at pp. 450, 451, (ANNOTATION SUPPLEMENTED, 97 L. Ed. 735); Berger and Krash, *Government Immunity From Discovery,* 59 Yale L. J. 1451 (1950).

The Court of Appeals was clearly wrong in considering the propriety of the exclusion of the Intelligence Unit agents from the witness stand on a ground of objection which was not stated at the trial. *Williams* v. *Kirtland,* 80 U. S. (13 Wall.) 306, 310, 20 L. Ed. 683, 684. Whether the evidence of the agents would have been relevant or material could only have been tested by permitting the agents to take the witness stand and passing upon the questions propounded to them by petitioner's counsel. Not permitting the witnesses to take the stand, thereby excluding competent and material evidence, is a gross

violation of due process. *Builders Steel Co.* v. *The Commissioner of Internal Revenue,* 179 F. 2d 377, 379-80 (C. A. 8th, 1950); *Donnelly Garment Co.* v. *N. L. R. B.,* 123 F. 2d 215, 224 (C. A. 8th, 1941).

THE QUESTION AS TO THE "NET WORTH METHOD".

3. This is not a case in which the government attempted to use the so-called "net worth method." Exactly the contrary. The Intelligence Unit agents, whom petitioner subpoenaed as witnesses on his behalf, had made a thorough investigation and audit of petitioner's net worth, and had found nothing open to question. (R. 216-19.) Petitioner sought to show this by their testimony, but, as pointed out above, was not permitted to do so. In the face of this, the Tax Court decided that petitioner failed in one respect to sustain his burden of proof because he did not make "use of the increase in net worth or bank deposit methods, just as in some instances, the Commissioner resorts to such methods to establish the amount of income." (R. 1842.) The Court of Appeals brought this strange holding of the Tax Court around full circle by sanctioning the latter's paradoxical reasoning with the statement that the "net worth method" was entirely beside the point in this case (p. 22, *infra*). We thus are left with the startling result that it is proper for the Tax Court to prevent petitioner from showing that there was no unexplained increase in his net worth, and at the same time to hold that petitioner failed in one respect to meet his burden of proof because he failed to use the "net worth method." Due process of law?

Unreasonable Delay in Making Findings of Fact.

4. On review, a litigant is confronted with the rule that the credibility of the witnesses is for the trial court. This rule rests upon the proposition that because the trial court saw and heard the witnesses it will have the impressions of their attitudes on the witness stand fresh in mind. Yet here we have a case where the trial court delayed for over three years in making its findings of fact and rendering its decision. The case was concluded on February 24, 1951 after fourteen days of trial. (R. 3.) At the conclusion, the Tax Court said that whatever delay there might be in the decision "will only be normal delay as far as the court is concerned." (R. 1800.) Yet the court's finding and opinion were not handed down until March 30, 1954. (R. 1850.) In the three-year interval, how many other cases did the same court try and how many other witnesses were "seen and heard" by it? After this long lapse, is not a reviewing court in just as good a position as the trial court to consider the evidence?

Where, as here, the Commissioner's case rests entirely on the testimony of interested witnesses, the question of credibility of the witnesses is of paramount importance. After a three-year lapse of time, the first-hand impressions received by the trial court upon observing the demeanor of the witnesses is necessarily greatly dimmed, so that its findings of fact cannot, in actuality, be based upon those impressions. And since it is established that a reviewing court will not pass on the credibility of witnesses, petitioner is thereby denied a genuine trial of the facts—without which due process of law cannot be satisfied.

Conclusion.

The unusual conduct of this case, from the time of the denial of discovery until the rendering of the decision three years after the conclusion of the trial, reveals such a blind disregard by the Tax Court—sanctioned by the Court of Appeals—of modern concepts of procedural due process as to call for the exercise of this Court's powers.

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated January 26, 1956.

APPENDIX A.

OPINION OF THE COURT BELOW.

CORRECTED.

IN THE UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.

No. 11299. OCTOBER TERM AND SESSION, 1955.

JOSEPH STARR, *Petitioner,*
vs.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Petition for Review of Decision of the Tax Court of the United States.

November 2, 1955.

Before DUFFY, *Chief Judge,* and MAJOR and LINDLEY, *Circuit Judges.*

DUFFY, *Chief Judge.* The Starr Pen Company was a partnership organized in 1935 by members of the Starr family. During 1943 and 1944 Joseph Starr, hereinafter called taxpayer, had a 70 per cent interest in the partnership, and Samuel Starr and Jack Starr each had a 15 per cent interest therein. The distributive income of the partnership was its net income after allowances for the salaries of the partnership. The business of the partnership

was the sale at wholesale of fountain pens and sets of fountain pens and mechanical pencils. The partnership did not manufacture any of the merchandise which it sold.

The Commissioner determined deficiencies for the years 1943 and 1944 claiming that the partnership received "black market" payments from one of its customers, and that the taxpayer failed to report any part thereof in his individual tax returns for those years. After an extended trial the Tax Court found the customer King, Larson and McMahon did make "side-payments" in cash to Starr Pen Company by paying to taxpayer the sum of $223,198.80 and to his partner, Samuel Starr, the sum of $12,000.00; that such payments were not reflected in taxpayer's returns for 1943 and 1944, and that such deficiency was due to fraud and an intent to evade tax.

The Tax Court found that Martin King, upon behalf of King, Larson and McMahon (hereinafter called K L & M) and taxpayer upon behalf of Starr Pen Company, entered into an oral agreement about April 15, 1943 whereby Starr Pen Company would sell large quantities of fountain pens and pen and pencil sets to K L & M. That in addition to regular invoice prices which would be paid by check, K L & M would make specified side-payments also referred to as royalties. The Tax Court found that the procedure used in making such payments was that checks of K L & M would be prepared at King's direction, payable to cash. King would cash the checks at a bank and receive currency in large denominations such as bills for $500 and $1000. King would then place the currency for each payment in an envelope and turn same over to taxpayer. In a few instances the currency was paid to taxpayer's brother, Samuel Starr.

It is the claim of taxpayer that he did not have a fair trial before the Tax Court. He first complains that after

the conclusion of the testimony the Tax Court delayed three years before making its decision. As we understand taxpayer's argument on this point, the decision in this case depended in large part upon the credibility of witnesses, and taxpayer claims the long delay worked to his disadvantage.

Certainly a delay of three years in making a decision in the case at bar is deplorable. ~~*If the course of progress, or more accurately speaking, the lack of progress after this case was submitted to the Tax Court, is not an exceptional and unusual situation, it indicates a break-down in the prompt administration of justice.**~~ However, we do not think it follows that we should hold this unfortunate delay was some kind of reversible error with the result that we would send the case back to the Tax Court which would involve a still further period of delay.

Taxpayer claims he was denied due process because of two rulings of the Tax Court. Prior to trial he filed a motion that he "be permitted to obtain discovery, by depositions and otherwise, of all matters not privileged, which would aid petitioner in the preparation for trial." In this connection taxpayer requested, in the alternative, (1) the Tax Court revise its rules of practice by permitting discovery procedures, or (2) that the Court enter an order permitting discovery in the instant case. Taxpayer's motion for discovery was denied.

Taxpayer concedes the Federal Rules of Civil Procedure are not applicable in the Tax Court. It is also without dispute that there is no statute or court rule authorizing discovery procedure in that Court.

Discovery procedure has improved the administration of justice and speeded the disposition of civil cases in both

* This sentence deleted at the direction of the Court of Appeals on November 28, 1955, in a letter to West Publishing Company and counsel of record.

state and federal courts. However, it has never been held that the Constitution of the United States requires that discovery procedure be adopted by any court. We are unwilling to make any such decision. In our view, no constitutional question is involved. Furthermore, we think the request that the Tax Court modify its rules was addressed to a matter that was purely discretionary with that court. *Board of Tax Appeals* v. *United States*, D. C. Cir., 37 F. 2d 442. We hold that taxpayer was not denied due process because the Tax Court refused to grant his motion for discovery.

Taxpayer subpoenaed as witnesses upon the trial two special agents of the Intelligence Unit of the Bureau of Internal Revenue. One of them, Edmund, had spent several months investigating the operations of taxpayer's business. The second agent, Worchester, had started his investigation of K L & M about a week prior to trial. The Court ruled that neither agent would be required to testify.

After taxpayer had subpoenaed the special agents he stated to the Court the subjects upon which he desired to question them. As to agent Edmund he stated he wanted "First, to ask what procedures he followed, what he did as to bank deposits, bank statements, and whether he required the petitioner to account for every bank deposit that he had made * * *. And whether he took a list of all the customers of the petitioner during the year 1943, that is before the period of sales by Conklin and Starr, to King, Larson & McMahon, during that period and after that period. Whether or not he didn't make an extensive investigation for the purpose of determining whether there was any evidence whatsoever that petitioner had asked any person or any customer, any single one of them, for any such thing known as a side payment or royalty or overage, anything of that sort. * * * I also intended to ask him whether he didn't make a complete, thorough

and exhaustive search and audit of the petitioner's net worth, and as to any property, both real property and personal property, tangible and intangible, petitioner may have had an interest in."

Taxpayer's counsel also stated he wanted to ask Edmund whether he had gone to other cities in following leads, and he then stated "In other words, in summary, I intended to ask him just exactly what he did in the course of his work as an agent of the Intelligence Unit to investigate the petitioner in relation to the charges that have been made by respondent's witnesses in this case." The information which taxpayer desired to obtain from Worchester was stated in very general terms, and pertained to the recently commenced investigation of K L & M.

Government's counsel objected to the witnesses testifying and cited Treasury Regulation 12,[1] reading as follows:

> "Whenever a subpoena shall be served upon them" (meaning employees of the Internal Revenue) "they will, unless otherwise expressly directed appear in court in answer thereto and respectfully decline to produce the records or give the testimony called for on the ground of being prohibited therefrom by the regulations of the Treasury Department. Officials disobeying these instructions will be dismissed from the service and may incur criminal liability."

The inherent conflict between the necessity of keeping some official governmental records confidential and the intense desire that justice be done between litigants has given rise to many perplexing questions which the courts

1. The validity of regulations forbidding disclosure promulgated by the Secretary of the Treasury, was established in *Boske* v. *Comingore*, 177 U. S. 459 which holding was followed in *United States ex rel. Touhy* v. *Ragen*, 340 U. S. 462, 469, 471.

have found difficult to solve.[2] Considerations of national security or other public interest are often of controlling importance. Governmental privilege against disclosure of official information often has been asserted.

We do not reach the question whether under any circumstances a special agent of the Intelligence Unit of the Treasury Department can be compelled to disclose the manner in which he conducted an investigation and to produce papers and documents that he may have obtained. It is apparent from the statement of taxpayer's counsel to the Court indicating the testimony which he sought to elicit from the agents, that such evidence was neither relevant nor material to the issues in this case. Of what moment was it that the agent may have made an investigation as to taxpayer's net worth? True it is that in many cases where direct testimony is unavailable, the Commissioner may be required to rely upon the net worth theory to show the existence of income. However, in the case at bar, the Commissioner was relying upon direct testimony as to the assets, source and amount of unreported income.

It also was immaterial as to the procedure which the agent followed in checking the records of the taxpayer. If there was anything in those records that was material to the issues of this case, the records themselves were the best evidence. Here, no demand was made for the production of any specific documents or records. It was apparent taxpayer's counsel was attempting to indulge in a "blind fishing expedition." *Gordon et al.* v. *United States*, 341 U. S. 414, 419. We hold, under the circumstances of this case, the exclusion of the testimony of the two gov-

2. See *Bowman Dairy Co. et al.* v. *United States, et al.*, 341 U. S. 214; *United States ex rel. Touhy* v. *Ragen*, 340 U. S. 462; *Rosen et al.* v. *United States*, 245 U. S. 467; *Ex parte Sackett*, 9 Cir., 74 F. 2d 922; *In re Valecia Condensed Milk Co.*, 7 Cir., 240 F. 310.

ernmental agents did not amount to such unfairness as to result in a denial of due process to taxpayer.

On the merits we think the Tax Court's findings that cash side payments above invoice prices made to taxpayer, or to his brother for the Starr Pen Company are supported by substantial evidence. King positively testified that he made such payments. Although taxpayer denied receiving same there was much additional corroborating evidence that such payments were, in fact, made. The trial court was entitled to disbelieve the testimony of the taxpayer that he, at no time during the period in question, received side payments or royalties. Far from being erroneous we think the findings are amply supported by the record.

The judgment of the Tax Court is

AFFIRMED.

APPENDIX B.

JUDGMENT OF THE COURT BELOW.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

Wednesday, November 2, 1955.

Before:

Hon. F. Ryan Duffy, Chief Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

JOSEPH STARR,
Petitioner,
No. 11299 *vs.*
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Review of a Decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the decision of the Tax Court of the United States entered in this cause on June 23, 1954, be, and the same is hereby,

AFFIRMED.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and rule involved	2
Statement	3
Argument	5
Conclusion	9

CITATIONS

Cases:	
Board of Tax Appeals v. *United States*, 37 F. 2d 442	6
Boske v. *Comingore*, 177 U. S. 459	7
Touhy v. *Ragen*, 340 U. S. 462	7
Statute:	
Internal Revenue Code of 1939, Sec. 1111 (26 U. S. C. 1952 ed., Sec. 1111)	2
Miscellaneous:	
Rules of Practice before the Tax Court of the United States, Rule 32	3
Treasury Regulations 12, Art. 80	7

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grant an exception to its rules so as to permit pretrial discovery procedures.

2. Whether, in the circumstances, it was a denial of due process for the Tax Court to exclude the testimony of two Internal Revenue agents on the claim of privilege.

3. Whether it was a denial of due process for the Tax Court to point out that taxpayer did not introduce evidence by the "net worth" or "bank deposit" methods to show that he had not received certain cash payments.

4. Whether it was a denial of due process for the Tax Court to delay in making its findings of fact until three years after the trial.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

> SEC. 1111. RULES OF PRACTICE, PROCEDURE, AND EVIDENCE.
>
> The proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the rules of evidence applicable in the courts of the District of Columbia in the type of proceedings which prior to September 16, 1938, were within the jurisdiction of the courts of equity of said District.
>
> (26 U. S. C. 1952 ed., Sec. 1111.)

Rules of Practice Before the Tax Court of the United States (revised to November 15, 1952):

> Rule 32.—*Burden of Proof.*
>
> The burden of proof shall be upon the petitioner, except as otherwise provided by statute, and except that in respect of any new matter pleaded in his answer, it shall be upon the respondent.

STATEMENT

The relevant facts, as found by the Tax Court (R. 1813–1839), and held by the Court of Appeals to be amply supported by the record (Pet. 23), are as follows:

During the taxable years 1943 and 1944, taxpayer was a partner in Starr Pen Company, with a 70 per cent interest, his brothers Samuel Starr and Jack Starr each having a 15 per cent interest. The Starr Pen Company purchased fountain pens and sets of fountain pens and mechanical pencils from manufacturers and sold them at wholesale. (R. 1813–1814.)

The firm of King, Larson and McMahon was formed in 1943. (R. 1816.) In April of that year, Martin King of that firm entered into an agreement with taxpayer, acting for Starr Pen Company, for the purchase from Starr Pen Company of large quantities of pens and pencils. (R. 1818–1819.) Under the agreement, King, Larson and McMahon were to pay Starr Pen Company for each type of pen or set an invoice price,

plus a "royalty" or "side-payment" to be paid in cash. (R. 1817–1818, 1822.)

All orders, with one exception, were sold under written invoices, and in each such case the invoiced price was paid by check. (R. 1822.) In addition, King paid the additional amount or "royalty" in cash, handing the currency directly to taxpayer or, in a few cases, to taxpayer's brother, Samuel Starr. The payment took place either at the Starr offices or at a restaurant where King met taxpayer for lunch. (R. 1824–1825, 1832–1834.) Contemporary records of such payments were kept on the books of King, Larson and McMahon. (R. 1826–1827.)

During the period from April 27, 1943, to January 4, 1944, King, Larson and McMahon, through King, made cash payments of "royalties," for merchandise sold and delivered by Starr Pen Company to King, Larson and McMahon, in the total amount of $235,198.80. (R. 1822.)

The amounts of the cash payments were not reported by Starr Pen Company in its returns nor reflected in taxpayer's returns. (R. 1850.) The Tax Court held that the cash payments in question were made, and that a part of the deficiency as determined by the Commissioner was due to fraud with intent to evade tax. (R. 1850.) The Court of Appeals affirmed the judgment of the Tax Court. (Pet. 24.)

ARGUMENT

Taxpayer in his statement (Pet. 5–6) undertakes to reargue the evidence, setting forth an incomplete summary of the testimony. The Commissioner introduced in the Tax Court evidence from the books and records of King, Larson and McMahon and the testimony of Martin King as to the cash or "side" payments to taxpayer or his brother Samuel, with corroborative testimony of King's partners, their bookkeeper, their attorney, and a private detective. On the basis of all the evidence, the Tax Court found that the cash payments were made in the amounts determined by the Commissioner. On review, the Court of Appeals held that this finding was amply supported by the record. The issues raised by taxpayer as to the fairness of the Tax Court proceeding were correctly decided below.

1. Taxpayer, prior to the trial in the Tax Court, moved that court to amend its rules or make an exception from them to permit, *inter alia,* pretrial discovery of all of the records of the three partners of King, Larson and McMahon, and of the records of some of their customers. (R. 45–60.) The motion was denied. (R. 61.) Taxpayer argues that the refusal to allow this request for discovery was a denial of due process of law. (Pet. 9–12.)

The court below pointed out that taxpayer conceded that the Federal Rules of Civil Procedure

are not applicable in the Tax Court, and that there is no statute or court rule authorizing discovery procedure in that court. (Pet. 19.) It also agreed with the Court of Appeals for the District of Columbia that modification of the Tax Court's rules is a matter discretionary with that court. *Board of Tax Appeals* v. *United States,* 37 F. 2d 442.

Taxpayer's argument appears to be that refusal to allow discovery is necessarily a denial of due process of law. Plainly, however, there is no authority for the proposition that the availability of pre-trial discovery—a relatively new development in the federal courts and one having no counterpart in many of the states—is a constitutional requirement.

2. Taxpayer subpoenaed as witnesses at the trial two special agents of the Bureau of Internal Revenue. One of them, Edmond, had spent several months investigating the operations of taxpayer's business. The other, Worcester, had started his investigation of the firm of King, Larson and McMahon about a week prior to trial. The Tax Court ruled that neither agent would be required to testify. (R. 1758–1763.)

Taxpayer's counsel stated in substance that the purpose in calling Edmond was to find out whether he had discovered any other similar "side" payments to taxpayer, and whether he had made an audit of taxpayer's net worth. (R. 1759–1760.) Counsel for the Commissioner stated

that no other unreported income had been discovered. (R. 1760). As to Worcester, taxpayer's counsel stated in substance that he wanted to show that no thorough check had been made of King, Larson and McMahon. (R. 1762.) Counsel for the Commissioner stated that Worcester had made no thorough investigation as yet. (R. 1763.) The Tax Court refused to compel the testimony on the ground that the witnesses had not received authorization under Article 80 of Treasury Regulations 12 (1920 ed.). (R. 1760.)

The Court of Appeals, after pointing out that the validity of Treasury Regulations forbidding disclosure have been upheld by this Court (*Boske* v. *Comingore,* 177 U. S. 459; *Touhy* v. *Ragen,* 340 U. S. 462, 469, 471), declined to consider the question whether there may be circumstances in which a special agent of the Treasury can be compelled to disclose the manner in which he conducted an investigation and to produce papers and documents he may have obtained. It was apparent that this case in no event furnished an occasion for denying the claim of privilege. The testimony sought was neither relevant nor material to any issue in the case. As the court below observed, the Commissioner was relying not on the net worth method, but on direct testimony, and insofar as the records of taxpayer were material, they themselves were the best evidence, rather than the procedure followed by the agent in checking them. (Pet. 21–22.)

The refusal of the courts below to deny the claim of privilege under these circumstances presents no issue requiring the consideration of this Court.

3. Taxpayer alleges that he was denied due process because the Tax Court *required* him to prove his net worth and at the same time prevented him from doing so by its refusal to compel the testimony of Edmond. (Pet. 14.) In its opinion, however, the Tax Court merely pointed out that taxpayer did not produce the testimony of Samuel Starr or his other partners, and that taxpayer might have attempted to prove by the net worth or bank deposit method that he did not receive the cash payments. (R. 1842.)

So far as there may be an implication in taxpayer's petition (pp. 3–4, 14) that the Commissioner relied on the presumption of correctness of his determination, and cast on taxpayer the burden of proving a negative, and then prevented him from proving it, such an implication is completely without foundation. The Commissioner assumed the burden of proving by positive evidence and direct testimony that the cash payments were made. Moreover, as we have indicated above, had taxpayer desired to prove his net worth, the best evidence of such worth would have been his own records rather than the testimony of an agent as to what he found therein.

4. There was a delay of three years between the time of the trial and the time when the Tax Court's findings and opinion were issued. The Court of Appeals stated that this delay was deplorable, but refused to find that it was reversible error which would require sending the case back to the Tax Court. (Pet. 19.)

If taxpayer is arguing (Pet. 15) that a delay of three years between trial and decision is necessarily a violation of the Fifth and Fourteenth Amendments, he cites no authority for such a novel doctrine. If, on the other hand, the petition for certiorari, though not making it explicit, is taken as raising the question whether such a delay as occurred here calls for the interposition of a reviewing court, not as a constitutional matter, but as a matter of judicial administration, it may be pointed out that such administrative supervision was effectively exercised by the Court of Appeals. By its deletion of the words contained in the original opinion (Pet. 19), that court has indicated that it has been satisfied that the delay here was "an exceptional and unusual situation" and did not indicate "a breakdown in the prompt administration of justice."

CONCLUSION

The decision of the court below is correct, there is no conflict of decisions, and the case presents no constitutional question requiring review by this

Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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